In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION, PETITIONER

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

1. The question presented in this case is whether a court of appeals may, at the request of the Federal Trade Commission, in appropriate case issue under the "all writs" statute (28 U.S.C. 1651(a)) a preliminary injunction to maintain the *status quo* pending the completion of a Section 7 (merger) proceeding instituted by the Commission. Respondent Dean attempts to recast the question as one of standing to sue, and argues that, because Congress has not specifically authorized the Commission to apply to the courts of appeals for such relief, the Commission may not do so (Dean Br. 1, 26–27). We believe this approach rests upon a misconception of the basis

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upon which the Commission invoked the "all writs" powers of the court of appeals.

We agree that the Commission is a creature of statute, and, in the absence of congressional authorization, does not enjoy the right of a private person to commence a suit. No one contends that the Commission may bring a criminal action in a district court or sue a businessman for damages; Congress has not authorized the Commission to commence such proceedings. But, while the Commission's authority to institute independent lawsuits is concededly dependent upon express statutory authorization, Dean's suggestion that the same principle applies to *ancillary* proceedings is wholly novel and unfounded. Congress has not expressly authorized the Commission to appear in judicial review proceedings brought by respondents pursuant to Section 11(c) of the Clayton Act (or Section 5(c) of the Federal Trade Commission Act) to set aside orders issued by the Commission; but it has never been suggested that the Commission therefore may not defend its orders in such proceedings. Similarly, it has never been suggested that, in a case where a court of appeals affirms the Commission's order and the respondent later disobeys the court's order, the Commission may not institute an ancillary contempt action in the court of appeals—though no statute authorizes the Commission to do so.

In both of the foregoing examples, and in the case at bar, the Commission is not attempting to commence an independent judicial action without having been authorized to do so; it is asking the court of appeals

to exercise the powers that Congress has given that court. Since Congress has authorized the courts of appeals to review Commission orders upon the petition of the party against which the order was issued, the Commission may—without any express statutory authorization—appear in support of the order. Since the courts of appeals are authorized to punish disobedience of their orders by contempt sanctions, the Commission may—without being expressly authorized to do so—ask the court to punish a party who has disobeyed the court's order affirming the Commission's order. And, equally, since Congress has authorized the courts of appeals under 28 U.S.C. 1651(a) to grant preliminary relief where appropriate in aid of their jurisdiction, the Commission—though Congress has not made express provision—may ask the court to exercise its power and grant such relief.

Hence, the Commission's standing to invoke the court of appeals' all-writs power is not a substantial issue here.[1] Indeed, respondents themselves nowhere express disagreement with the holding of *Board of*

[1] For the proposition that the Commission must in all circumstances have express statutory authorization to proceed, respondent Dean relies upon *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U.S. 619, 623, and *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628. We find nothing in the latter case bearing even remotely on this subject. *Eastman Kodak* decided that the Commission could not direct divestiture in a Federal Trade Commission Act proceeding, Congress not having explicitly authorized it to grant such relief. This view of the Commission's powers has since been rejected. *Pan American World Airways* v. *United States*, 371 U.S. 296, 312–313, nn. 17–18; *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 129–131.

Governors v. *Transamerica Corp.*, 184 F. 2d 311 (C.A. 9), certiorari denied, 340 U.S. 883, that the Federal Reserve Board was entitled to ask the court of appeals to exercise its all-writs powers, although the Board, like the Commission, has not been expressly authorized to do so. And they disregard *Public Utilities Commission* v. *Capital Transit Co.*, 214 F. 2d 242 (C.A. D.C.), and *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775, 779 (C.A. 2)—additional authorities to the same effect.

The critical inquiry, in short, is not whether the Commission has authority to invoke the jurisdiction of the court of appeals under the all-writs act, but whether that act authorizes the court to grant a preliminary injunction pending the completion of the administrative proceedings. As developed at length in our main brief, the court has such authority.

2. Dean's contention, *supra*, that there must be an express statutory basis apart from 28 U.S.C. 1651(a) to support the Commission's request that the court of appeals issue a preliminary injunction colors its entire argument. Dean conceives the issue of this case to be whether Congress has granted the Commission authority to seek such an injunction. The true issue, however, is whether Congress has ever withdrawn from the courts of appeals their historic powers, derived not from the Clayton Act but from Section 1651(a) and its predecessors dating back to the first Judiciary Act (1 Stat. 81–82), to grant such relief in a case like the present. We submit it has not—and that Dean's heavy stress throughout its brief upon the fact that Congress has on several occasions failed

to act upon proposals to give the Commission express statutory authority to grant or obtain preliminary relief in merger cases is particularly misplaced.

United States v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, is instructive on this point. The threshold question there was whether Section 7 of the Clayton Act, as originally enacted in 1914, reached vertical stock acquisitions. Neither the Federal Trade Commission nor the Department of Justice had ever before brought a vertical case under Section 7. The Commission "repeatedly ha[d] declared its understanding that § 7, prior to its amendment in 1950, applied only to competing corporations." 353 U.S., p. 615 (dissenting opinion). And, "[b]eginning in 1927, the Federal Trade Commission included in its annual recommendations to Congress a request that § 7 be amended to remedy its inadequacies." *Id.*, p. 616. In 1950, these efforts bore fruit and Section 7 was amended, *inter alia*, "'to make it clear that the bill applies to all types of mergers and acquisitions, vertical * * * as well as horizontal.'" *Ibid.* Nevertheless, this Court held that the prior history was not of controlling significance and that the original Section 7 did reach vertical stock acquisitions.

The present is an *a fortiori* case. There was no "established administrative practice" (*ibid.*) of not invoking the courts of appeals' Section 1651(a) powers in Federal Trade Commission matters. On the contrary, twice before the present case the Commission had attempted to do so, in *Federal Trade Commission* v. *Farm Journal, Inc.*, C.A. 3 (unreported), and *Federal Trade Commission* v. *Interna-*

tional Paper Co., 241 F. 2d 372 (C.A. 2); that the Commission thereafter took the view that legislative action was necessary surely has no more significance here than in *duPont*. Moreover, here Congress cannot be thought to have "acquiesced in and recognized" (353 U.S., p. 616) the Commission's view of its lack of power, since it never acted upon the Commission's proposals to amend the law. And even had it voted them down, that would not be determinative. For as Dean concedes (Br. 31, n. 15), all the proposals were substantially different in their approach from what the Commission has attempted in this case. They included such features as compulsory pre-merger notification and administrative injunctions—features that Congress might well have found objectionable while agreeing that the Commission should be able to invoke the traditional stay powers of the courts of appeals.

3. Respondent Dean also contends that the Commission's attempt to obtain preliminary relief in this case denied it its procedural rights. There is no merit to this contention.

(*a*) Dean states that the Commission has "so committed itself to the respondents' guilt" in the preliminary-injunction proceeding that its ability to adjudicate the case on the merits has been "rendered suspect" (Br. 19). For this proposition, Dean relies on quotations excerpted from the briefs and pleadings filed by government counsel in this proceeding—*e.g.*, "it is probable" or it "appears likely" that the Dean-Bowman merger is illegal (Dean Br. 20). Examination of these excerpts in context reveals, however, that counsel for the agency have done no more than what

Congress has required the agency itself to do before it issues a complaint: determine that it has "reason to believe" that there has been a violation of law. 15 U.S.C. 21(b), 45(b). This is not prejudgment; if it were, no judge could try a case in which he had issued a preliminary injunction. And see *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700–703.

(*b*) Dean complains (Br. 27, n. 11) that the Commission acted improperly in going to the court of appeals without having first promulgated a rule authorizing it to do so. But the Commission, in common with most other agencies, rarely adopts rules specifying the many circumstances in which judicial proceedings may be instituted. The reasons are plain. A governmental agency may not go to court unless authorized (either expressly or, in the case of ancillary proceedings, impliedly; see pp. 2–3, *supra*) to do so by Congress. If it has such authority, promulgating a rule permitting it to exercise the authority is superfluous; if it has not, it cannot by rule create such authority. Nor can a respondent possibly be prejudiced by the absence of a rule defining the agency's power to invoke judicial process. The purpose of requiring agencies to act in conformity with published rules is to protect persons appearing before the agency from having to resort to unpublished procedures (Section 3(a) of the Administrative Procedure Act, 5 U.S.C. 1002(a)). Nothing of that sort is involved here. Respondents are not being made to forfeit rights because of their failure to invoke an unpublished procedure of the agency—the abuse that

the provision of the Administrative Procedure Act (Section 3(a), *supra*) relied upon by Dean is designed to prevent.

(*c*) Dean contends that the Commission's action in asking the Seventh Circuit for preliminary relief has, "as a practical matter," deprived Dean of its right to a choice of forums for judicial review of any order the Commission may ultimately enter (Br. 22). This is not so, as the *Transamerica* litigation illustrates. The Federal Reserve Board had sought and obtained a preliminary injunction from the Ninth Circuit (*Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311, certiorari denied, 340 U.S. 883), but respondent appealed the Board's final order to the Third, not the Ninth, Circuit which set the Board's order aside (*Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163).

The remaining points,[2] we believe, are adequately covered in our main brief.

Respectfully submitted.

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[2] Respondent Bowfund argues (Br. 5–6) that the writ of certiorari should be dismissed as to it on the ground that it is not a necessary party in this litigation. Its joinder as a party may, however, be proper and appropriate for purposes of ensuring adequate relief. See *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 608. We consider this an issue for the lower court to decide in the first instance.

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